

University of Colorado Law School

Colorado Law Scholarly Commons

Allocating and Managing Water for a
Sustainable Future: Lessons from Around the
World (Summer Conference, June 11-14)

2002

6-11-2002

The Legal Response to the World's Water Crisis: What Legacy from the Hague? What Future in Kyoto?

Patricia Wouters

Salman M. A. Salman

Patricia Jones

Follow this and additional works at: <https://scholar.law.colorado.edu/allocating-and-managing-water-for-sustainable-future>



Part of the [International Law Commons](#), [Sustainability Commons](#), [Transnational Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Wouters, Patricia; Salman, Salman M. A.; and Jones, Patricia, "The Legal Response to the World's Water Crisis: What Legacy from the Hague? What Future in Kyoto?" (2002). *Allocating and Managing Water for a Sustainable Future: Lessons from Around the World (Summer Conference, June 11-14)*.
<https://scholar.law.colorado.edu/allocating-and-managing-water-for-sustainable-future/3>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Patricia Wouters, Salman M. A. Salman & Patricia Jones, *The Legal Response to the World's Water Crisis: What Legacy from the Hague? What Future in Kyoto?*, in *ALLOCATING AND MANAGING WATER FOR A SUSTAINABLE FUTURE: LESSONS FROM AROUND THE WORLD* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2002).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

**The Legal Response to the World's Water Crisis:
What Legacy from the Hague?
What Future in Kyoto?**

Dr. Patricia Wouters[†]
Dr. Salman M. A. Salman[‡]
Patricia Jones^{‡‡}

*Water is vital for the life and health of people and ecosystems and a basic requirement for the development of countries, but around the world women, men and children lack access to adequate and safe water to meet their most basic needs. Water resources, and the related ecosystems that provide and sustain them, are under threat from pollution, unsustainable use, land-use changes, climate change and many other forces.*²²⁹

1. World Water Crisis

The organizers of the second World Water Forum, held at the Hague, March 17 to 22, 2000, are to be congratulated for successfully focusing the international community's attention on the world's water problems. That a serious water crisis will occur appears certain: nearly 450 million people in 29 countries face water shortage problems now and this is expected to increase to 2.5 billion people by 2050.²³⁰ In addition, over a billion people do not have access to safe drinking water and sanitation is minimal for half the world's population.²³¹ Responding to this compelling challenge, politicians from around the world adopted a declaration, entitled *Ministerial Declaration of the Hague on Water Security for the 21st Century*, advocating integrated water resources management.²³² Supplemental to this, the *World Water Vision* moves forward with the assistance of a new

[†] Dr. Patricia Wouters, Director, International Water Law Research Institute, Department of Law, University of Dundee, Dundee, Scotland, e-mail: p.k.wouters@dundee.ac.uk.

[‡] Dr. Salman M. A. Salman, Lead Counsel, Legal Department, The World Bank, Washington, D.C., e-mail: Ssalman@worldbank.org.

^{‡‡} Patricia Jones, PhD candidate and Research Fellow, International Water Law Research Institute, Department of Law, University of Dundee, Dundee, Scotland, e-mail: p.a.jones@dundee.ac.uk.

²²⁹ Second World Water Forum, *Declaration of the Hague*, Ministerial Declaration of the Hague on Water Security in the 21st Century, available at <http://www.worldwaterforum.net/index2.html> (last visited June 11, 2001) [hereinafter Ministerial Declaration].

²³⁰ Press Release, World Water Council, The World Water Gap: World's Ability to Feed Itself Threatened by Water Shortage (Mar. 20, 1999), available at <http://www.worldwatercouncil.org/press.htm> (last visited June 11, 2001).

²³¹ Ministerial Declaration, *supra* note 229.

²³² *Id.*

institutional mechanism, the *Framework for Action*.²³³ While we applaud this effort, one important factor is overlooked and under-utilized in the formulation of the global response: water law.

2. Responding to the Crisis

Approximately 6000 people converged on the Hague, including 159 delegations for the parallel Ministerial meeting. The attendees were spoiled for choice when it came to papers, presentations, and entertainment. Unfortunately, the quality of some of these presentations left much to be desired and detracted from the overall, general high calibre of the meeting. For example, the World Water Council's ("WWC") World Water Vision Report, *Making Water Everybody's Business*,²³⁴ and the World Commission for Water's ("WCW") World Water Vision Report, *A Water Secure World*,²³⁵ both failed to accurately reflect the international law governing transboundary watercourses. Green Cross International's *National Sovereignty and International Watercourses* report somewhat mitigated this shortcoming. The WCW commissioned the report, which not only favourably refers to the United Nations ("UN") 1997 Watercourses Convention, but also accurately discusses relevant international water law.²³⁶ While it is difficult to imagine a report adding anything innovative to the state sovereignty issue, its strength stems from reference to positive case studies and succinctly accurate statements on international water law.²³⁷ The report correctly emphasizes that "the management of international watercourses should be determined less by the traditional notion of 'restricted sovereignty' than by a positive spirit of co-operation and effective interdependence."²³⁸

The Global Water Partnership's *Framework for Action* document, while incomplete in its discussion of international water law, contains positive elements that hold hope for the future.²³⁹ For example, it rightly emphasizes the need for legal development and regulatory frameworks for the local, regional, and international implementation of water security.²⁴⁰ The *Framework for Action* also calls for the development of institutional mechanisms and shared

²³³ GLOBAL WATER PARTNERSHIP, TOWARDS WATER SECURITY: A FRAMEWORK FOR ACTION (2000), available at <http://www.gwpforum.org/Library.htm> (last visited June 11, 2001) [hereinafter FRAMEWORK FOR ACTION].

²³⁴ WORLD WATER COUNCIL, WORLD WATER VISION: MAKING WATER EVERYBODY'S BUSINESS (2000), available at <http://www.worldwatervision.org/vision.htm> (last visited June 11, 2001).

²³⁵ World Water Council, *Reports, A Water Secure World*, at <http://www.worldwatercouncil.org/reports.htm> (last visited June 11, 2001).

²³⁶ GREEN CROSS INTERNATIONAL, NATIONAL SOVEREIGNTY AND INTERNATIONAL WATERCOURSES (2000).

²³⁷ *Id.* at 65 98. Case studies discussed include the Ganges, the Aral Sea, the Senegal, the Danube, the Mekong, the Mahakali, the Tigres Euphrates, and the Nile Basins.

²³⁸ *Id.* at 18.

²³⁹ FRAMEWORK FOR ACTION, *supra* note 233.

²⁴⁰ *Id.* at 31 35.

waters agreements in all major river basins by the year 2015.²⁴¹ The document aligns itself with the recommendations in the Green Cross Sovereignty Report, which calls on States to actively pursue the adoption of both the UN Watercourses Convention and the equitable and reasonable utilization principle.²⁴² However, some obvious confusion exists in the *Framework for Action* that is not present in the Green Cross report, such as the former's reference to the "no-harm rule" as the primary rule governing international waters.²⁴³ International water law entitles and obligates riparian States to use their international watercourses equitably and reasonably. This rule is codified in Article 5 of the UN Watercourses Convention.²⁴⁴ This is not a "compromise" principle, as the *Framework for Action* states,²⁴⁵ but a codified rule of customary international law.

3. Ministerial Declarations: "Water Security in the 21st Century"

One of the most important documents from the Hague meeting is the Ministerial Declaration.²⁴⁶ This instrument identifies the main challenges to achieving water security: meeting basic needs; securing food supply; protecting ecosystems; sharing water resources; managing risks; valuing water; and governing water wisely.²⁴⁷ Endorsing the "water security" goal, the Declaration identifies, as a primary concern, the need to share water resources "through sustainable river basin management or other approaches."²⁴⁸ The Ministers pledged to set targets and strategies for attaining water security, but, unfortunately, did not adopt targets at the conference.

Interestingly, the Declaration commits governments to working with all stakeholders to develop rules and procedures addressing liability and compensation for damage to water resources resulting from dangerous activities.²⁴⁹ The Declaration lists issues the international community must confront at the local, national, regional, and international levels. It calls on the Global Environmental Facility to expand work on national management plans, which have

²⁴¹ GLOBAL WATER PARTNERSHIP, TOWARDS WATER SECURITY: A FRAMEWORK FOR ACTION, EXECUTIVE SUMMARY (2000), available at <http://www.gwpforum.org/Library.htm> (last visited June 11, 2001) [hereinafter FFA EXECUTIVE SUMMARY]. "Mechanisms between riparian states in all major river basins should be developed and shared waters agreements formulated by 2015." *Id.* at 4.

²⁴² FRAMEWORK FOR ACTION, *supra* note 233, at 33.

²⁴³ *Id.* at 32.

²⁴⁴ United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, U.N. Doc. A/51/869 (1997), reprinted in 36 I.L.M. 700, available at <http://www.un.org/law/ilc/texts/nnavfra.htm> (last visited June 11, 2001) [hereinafter 1997 UN Watercourses Convention]. The United National General Assembly passed the resolution containing the 1997 UN Watercourses Convention by a vote of 103 in favour, 3 against and 27 abstentions.

²⁴⁵ FFA EXECUTIVE SUMMARY, *supra* note 241.

²⁴⁶ Ministerial Declaration, *supra* note 229.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

a beneficial impact on international waters.²⁵⁰ However, one major shortcoming of the Declaration is its failure to mention the UN Watercourses Convention. In addition, the Declaration fails to endorse the WCW's and the *Framework for Action's* vision. Some of the delegates attributed these shortcomings to a lack of authorization from their governments. Delegates received both reports only at the meeting; they did not have adequate time to consult with their governments.

4. Water Law: What Relevance?

A number of possible explanations exist for the fact that water law was either absent, inaccurately represented, or had limited presence at the meeting: (i) it bears little or no relevance to the world's water problems; (ii) it is considered too adversarial or controversial to adopt as an integral part of the solution; or (iii) it is not clearly understood. From our experience, the latter appears to be the primary reason.²⁵¹ Hopefully, the international community can overcome this obstacle before the meeting of the Third World Water Forum, scheduled for the year 2003 in Kyoto, Japan.²⁵² The January 2002 meeting in Bonn²⁵³ and the 2002 mid-year Rio-plus-10 meeting may offer choice opportunities to correct the inadequacies of the Hague.

One move in the right direction is the recognition of the role that water law and lawyers can play in the management of the world's water resources. The Hague meeting underscored the importance of such recognition when it announced that this year's Stockholm Water Prize was awarded to South Africa's Professor Kader Asmal, an eminent lawyer, for his work as the Minister of Water Resources. Professor Asmal was the driving force behind both the adoption of the comprehensive water code in South Africa and the drafting and completion of the Southern Africa Development Community (SADC) Protocol on Shared Watercourses. Professor Asmal has also brought water to more than three million South Africans during his tenure as a minister.

Water law, whether national or international, is relevant at all stages of water resource development and management. One can identify the following three critical stages:

²⁵⁰ *Id.*

²⁵¹ From meetings with Donor agencies, and consultations with governments, as well as discussions with participants of the Dundee annual international and national water law and policy seminar, a concern of public and private sector stakeholders has been a lack of information and understanding of international water law.

²⁵² See The 3rd World Water Forum, available at <http://www.worldwaterforum.org> (last visited June 11, 2001).

²⁵³ Dublin +10, referring to the to Dublin Principles adopted in 1992, which advocate integrated water resource management – IWRM. The Dublin Principles are available at <http://www.dundee.ac.uk/law/water> (last visited June 11, 2001).

1. **Legal entitlement.** Authorities must identify all stakeholders and devise a mechanism for securing their entitlement. Without these two elements, one cannot enforce access to the resource.
2. **Framework for allocation.** Once the appropriate authorities decide what uses to permit, they must devise a framework for allocation. Ideally, this framework must be flexible, yet predictable, and capable of enforcement.
3. **Compliance, dispute avoidance and dispute settlement.** Once the authorities establish a framework for allocation, it is important that they put mechanisms in place to monitor and enforce compliance with that regime. Also, mechanisms for avoiding and peacefully settling disputes are of the utmost importance.

For each stage, it is critical that the implementing agency adopt an interdisciplinary approach. Hydrologists, engineers, and economists might identify option ranges for the indicators of each stage, but a legal framework will provide the parameters for implementation and ensure the arrangement's stability.

5. The UN Watercourses Convention: What Virtues?

Some of the documents, presentations, and discussions at the World Water Forum criticized the UN Watercourses Convention on numerous counts. Many of these criticisms were unfounded and could serve only to undermine the global attempt to ensure the peaceful sharing and protection of transboundary waters. The Convention, adopted on May 21, 1997, was open for signature until May 20, 2000.²⁵⁴ Presently, it has fifteen signatories and seven ratifications. Contrary to the views of many noted "experts," the Convention did not require thirty-five ratifications by May 20, 2000 in order to come into force. As with many other global international treaties, the UN Watercourses Convention will come into force upon acquiring the necessary number of ratifications.²⁵⁵ This could occur at any time and, in fact, is a feasible possibility. However, even if the Watercourses Convention never enters into force, it already has generated considerable influence on States. This influence is apparent in the drafting of new agreements or the diplomatic negotiations between States regarding their shared watercourses. For instance, the drafters of the Southern African Development Community Protocol on Shared Watercourses have rewritten the protocol to include the main provisions of the Convention.²⁵⁶ Additionally, the International Court of Justice underscored the Convention's importance when it referred to a number of its provisions within the *Gabcikovo-Nagymaros* case, a dispute between Hungary and Slovakia over the

²⁵⁴ 1997 UN Watercourses Convention, *supra* note 244, art. 34.

²⁵⁵ 1997 UN Watercourses Convention, *supra* note 244, art. 36.

²⁵⁶ Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region, available at <http://www.sadcwscu.org.ls/protocol/protocol.htm> (last visited June 11, 2001).

Danube.²⁵⁷ In any event, many of the substantive rules contained in the Convention reflect customary international law, which binds all States regardless of entry into force of the UN Convention.

Another ill-founded criticism voiced at the Hague meetings was that the Convention failed to meet environmental imperatives, including the new mantra of “sustainable development.” The Convention’s purpose is to provide a framework for States to define their relations concerning transboundary waters, not to design an environmental conservation package that includes international waters as part of the scheme. In fact, the principle of equitable and reasonable use, along with the mechanisms for operationalizing it, incorporates the notion of sustainable development.²⁵⁸ In addition, this provision allows decision makers to consider all relevant factors in the overall assessment of what qualifies as a legitimate use. It is clear that sustainable development and environmental protection and conservation are relevant factors to be considered in particular circumstances.

The suggestion that the Convention is weak because it does not require that all existing watercourse agreements be consistent with its provisions fails to recognize the consequences of such a proposition. This requirement would declare some 3000 existing watercourse agreements void upon the Convention’s adoption, resulting in unnecessary chaos and confusion. Moreover, it is unlikely that the General Assembly of the United Nations in May 1997 would have adopted the Convention if it had included provisions to this effect. The Convention provides a model upon which to base negotiations for change—relevant to agreements requiring modification.

The strongest element of the Convention is its procedural mechanisms. These mechanisms provide predictable and pragmatic guidelines by which States can lawfully develop their international waters. This is especially important for States that share an international watercourse for which no agreement exists. Participation in the UN Watercourses Convention could enhance the opportunity for co-operation as well as attract international financing for the development of the water resources within the entire basin.

Although the UN Watercourses Convention is not a perfect instrument, it goes a long way toward providing States with a useful framework that facilitates the peaceful development of shared watercourses through substantive and procedural rules. On the substantive side, it places all States on a level playing field. This permits each state to

²⁵⁷ Case Concerning the Gabcikovo Nagymaros Project (Hungary/Slovakia) (Sept. 25, 1997), *reprinted in part in* 37 I.L.M. 162 (1997), case excerpts *available at* <http://www.icj.law.gla.ac.uk> (last visited June 11, 2001).

²⁵⁸ Article 5 of the 1997 UN Watercourses Convention uses the term “sustainable utilization.” Article 24.2.a requires a watercourse State to consult to “plan the sustainable development” of an international watercourse.

put forth its case based on all factors relevant to its particular needs, emphasizing the equality of riparian States' rights.²⁵⁹ It also includes protective provisions regarding the ecosystem.²⁶⁰ On the procedural side, the Convention has many strengths. It offers States pragmatic mechanisms, including exchange of information, consultations, establishment of joint mechanisms, notification for planned measures, and other means aimed at avoiding disputes and attaining agreeable solutions.²⁶¹

6. The Way Forward: Embracing Water Law as Part of the Response

The Third World Water Forum will take place in Kyoto, Japan, in 2003, most likely following a format similar to the Hague meeting. Hopefully, water law will play a more prominent role leading up to the next meeting. To achieve water security, it is important to follow an approach involving “co-operation between different kinds of water users, and between those sharing river basins and aquifers, within a framework that allows for the protection of vital ecosystems from pollution and other threats.”²⁶² The means for achieving such cooperation will originate from a number of sources, with politics playing an important role at all stages. However, once authorities agree upon the parameters for cooperation, water law is essential to sustain the cooperation.

Globalisation marks the current era, with transnational acts of global commerce blurring national boundaries. What are the rules of law that apply to transactions in this arena that affect water resources? At the national level, the legislature needs to resolve similar issues when revising national legislation. Equally, law plays an important role in private sector participation and privatisation. Each of these very different scenarios impacts directly on water resources; water law could determine the terms on which stakeholders are ensured equitable and sustainable access in all events.

Good practices concerning integrated water resources management require input from all disciplines, including the law. As one authority put it, “to achieve water security, water must be made *everybody's* business.”²⁶³

²⁵⁹ 1997 UN Watercourses Convention, *supra* note 244, arts. 5, 6. This does not necessarily mean equality of share of the waters. For interpretative commentary, *see* Report of the International Law Commission on the Work of its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), *reprinted in* Y.B.I.L.C., vol. II, pt. 2, at 88 (1994).

²⁶⁰ 1997 UN Watercourses Convention, *supra* note 244, arts. 7, 20 24.

²⁶¹ 1997 UN Watercourses Convention, *supra* note 244, arts. 3, 4, 8, 9, 11 19, 30, 32, 33.

²⁶² FFA EXECUTIVE SUMMARY, *supra* note 241, at 1.

²⁶³ The Forum Chairman, HRH The Prince William of Orange, Opening Speech at World Water Forum (Mar. 17, 2000).



**Economic and Social
Council**

Distr.
GENERAL

MP.WAT/2000/5
17 December 1999

ORIGINAL : ENGLISH

UNITED NATIONS

ECONOMIC COMMISSION FOR EUROPE

**MEETING OF THE PARTIES TO THE CONVENTION
ON THE PROTECTION AND USE OF TRANSBOUNDARY
WATERCOURSES AND INTERNATIONAL LAKES**

Second meeting,
The Hague, Netherlands, 23-25 March 2000
Item 5 (c) of the provisional agenda

**GENEVA STRATEGY AND FRAMEWORK FOR MONITORING COMPLIANCE WITH
AGREEMENTS ON TRANSBOUNDARY WATERS */**

Outcome of the joint UN/ECE-UNEP project with the Netherlands
as lead country

1. With a view to assisting riparian States bordering the same transboundary waters to ensure compliance with the regimes that govern their transboundary waters, this document proposes a strategy and framework for compliance review. The proposed scheme can be applied at the international, regional, transboundary and catchment area levels, in the context of bilateral or multilateral agreements. It will also help joint bodies to comply with their obligations under agreements on transboundary waters.

_____/ */ This document has not been formally edited.

GE.99-

2. Under the overall guidance by Mr. W. Kakebeeke (project leader, Netherlands), the strategy and framework have been drawn up by Mrs. P. Wouters (consultant, Water Law and Policy Programme, Dundee University, Scotland, United Kingdom) in consultation with a group of invited experts. Staff of the UN/ECE and UNEP/ROE secretariats assisted in the drafting of this document and provided secretariat services (annex II).

3. The views expressed in this document are those of the consultant and the other experts and do not necessarily reflect those of their organizations and institutions.

Draft decisions

4. In addition to the draft decisions set out in document MP.WAT/2000/4, the Meeting may wish:

(a) To examine the draft recommendations contained in proposed compliance review procedure (annex I) together with the explanatory notes contained in document MP.WAT/2000/5/Add.1;

(b) On the basis of the procedure proposed in annex I and the outcome of the discussion at the second meeting of the Parties, to entrust the Working Group on Legal and Administrative Aspects to draft a compliance review procedure together with the Working Group on Water and Health (and any other appropriate body expected to be set up by the Signatories to the Protocol on Water and Health at its first meeting), for consideration by the Meeting of the Parties to the Convention and the Meeting of Signatories of the Protocol.

Annex I

**GENEVA STRATEGY AND FRAMEWORK FOR MONITORING COMPLIANCE WITH
AGREEMENTS ON TRANSBOUNDARY WATERS:
ELEMENTS OF A PROPOSED COMPLIANCE REVIEW PROCEDURE**

Prepared by Mrs. P. Wouters (consultant, Dundee University, United Kingdom)
in consultation with the group of invited experts
and with the assistance of the UN/ECE and UNEP/ROE secretariats

Introduction

1. With a view to assisting riparian States bordering the same transboundary waters to make a significant contribution to compliance with the regimes that govern their transboundary waters, this document proposes a strategy and framework for compliance review. The elements set out below can be applied at the international, regional, transboundary and catchment area levels, in the context of bilateral or multilateral instruments. It will also help joint bodies to comply with their obligations under agreements on transboundary waters.

2. The terms used in this document are terms used in the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, March 1992) and its Protocol on Water and Health (London, June 1999) rather than in other agreements and arrangements covering transboundary watercourses and international lakes. For technical and administrative reasons, the explanatory notes are compiled in document MP.WAT/2000/5/Add.1.

I. GENERAL CONSIDERATIONS AND APPROACHESCompliance with international obligations

3. Implementation and compliance encompass those State activities aimed at achieving the goals and objectives of the treaty regime 1/. Compliance is an integral component of implementation and refers to a State's behaviour in terms of its conformity with treaty commitments. A compliance system is the set of treaty rules and procedures aimed at assessing, regulating, and ensuring compliance. It is normally used to identify the acts of non-compliance, i.e. where a State does not meet its commitments, including its inability to give effect to substantive norms and standards; to fulfil procedural requirements; or to fulfill institutional obligations. This may be accomplished through the creation of a compliance review procedure.

Reasons for non-compliance

4. Compliance depends on a State's willingness and ability to meet specific treaty obligations. 2/ Thus a compliance system must anticipate the likely sources or motivations for Parties' non-compliance, and design responses that are likely to overcome resistant behaviour. 3/ Reasons for non-compliance may include ambiguity and indeterminacy in treaty language; limitations on the capacity of Parties to carry out their undertakings; and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties. 4/

Monitoring compliance with international watercourse agreements is essential

5. Compliance with agreements on transboundary waters is essential to the sustained integrity of the agreed regime and to the peaceful management of transboundary waters in question. With more than 500 international agreements concluded between riparian States, monitoring compliance could ensure the successful future of these arrangements. An operational compliance review procedure would facilitate this process.

Need for compliance review procedures

6. Agreements on transboundary waters do not provide for compliance review procedures. Distinct from the practice of some recent global environmental agreements, 5/ most agreements on transboundary waters do not provide for the monitoring of compliance. The only recent global convention on transboundary waters, the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (not yet entered into force), apart from compulsory fact-finding, 6/ does not require the monitoring of compliance. States are encouraged to develop compliance review procedures under regional framework agreements 7/, such as the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992). 8/ They shall develop such procedures under its supplemental 1999 Protocol on Water and Health. Recent regional agreements, directly, 9/ and indirectly, 10/ concerning transboundary waters also provide for the elaboration of compliance review procedures.

Non-legally binding mechanisms and the activities of joint bodies may enhance compliance review

7. Non-legally binding mechanisms may also contribute to ensuring compliance. Soft-law instruments, such as guidelines, voluntary measures, targets and action plans, may provide the basis and mechanisms for compliance review. 11/ Joint bodies play an important role in the compliance review process, i.e. through monitoring of action plans, and of the efforts of States to meet objectives, standards and targets.

II. COMPLIANCE STRATEGY

Basic principles

8. The proposed strategy and framework for compliance review are based on the following premises:

(a) The Parties agree to monitor compliance with their agreement(s) on transboundary waters through the establishment of a compliance review process. This commitment of States may be found in the agreement on transboundary waters, or in subsequent instruments or mechanisms, including, for example, a decision of the Meeting of the Parties or activities of joint bodies; 12/

(b) The compliance review process should be based on mechanisms designed to enhance, improve and ensure compliance, rather than on compliance control and enforcement tools and traditional judicial mechanisms. To this end, the regime created should focus on positive measures and incentives aimed at facilitating compliance;

(c) The instrument embodying the compliance review procedure should be, ideally, legally binding. The obligations subject to compliance however, may arise out of non-legally binding instruments, for example, guidelines, voluntary measures, targets and objectives, and may relate to assessment of efforts undertaken, and not only of results achieved; 13/

(d) The compliance review procedure is greatly enhanced by:

The elaboration of clear primary rules, objectives or targets;

The elaboration of compliance information systems;

The involvement of an institutional mechanism;

A response to problems with compliance that, in the first instance, is positive, forward-looking, non-confrontational and non-judicial and, is supplementary to, independent from, any settlement regime. 14/

Foundation for the strategy

9. Most agreements on transboundary waters, including the recently adopted 1997 UN Watercourses Convention, do not provide for compliance review. However, certain instruments, such as the 1999 Protocol on Water and Health to the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes envisage the elaboration of a compliance

review procedure. 15/ Clearly, a strategy for compliance review must be founded on a commitment to such a procedure agreed to by States.

First element of the strategy: Establishing a baseline and system for review

10. Effective development of the compliance strategy requires a baseline for review, i.e. clear obligations capable of being verified. 16/ An agreed baseline and method for verification, established in a transparent and participatory manner, should preferably be in place before the compliance review procedure is implemented. The compliance information system (i.e. monitoring, reporting, review, evaluation) should also be agreed to by the Parties. 17/

Second element of the strategy: Establishing the compliance review procedure

11. The compliance review procedure should be set forth in a comprehensive compliance review framework and may be implemented through formal or informal mechanisms. Some of its elements may be contained in the treaty regime, i.e. exchange of information, monitoring of standards or objectives, international support for national action, international cooperation, joint and coordinated international action, and so forth. However, these components alone are not sufficient to ensure an efficient compliance review mechanism.

Third element of the strategy: Institutional mechanism

12. The establishment of formal procedures for monitoring compliance should be regarded as a core element of any compliance review procedure. An institutional mechanism, possibly in the form of the compliance review committee, should be created to provide a forum for dealing with compliance review without the necessity to invoke the dispute settlement mechanisms. The review procedure could serve also to open avenues for positive support measures aimed at enabling compliance, such as technical advice and assistance, the elaboration of financial incentive schemes, and could provide a clearing-house for reporting and review of the Parties performance under the treaty regime.

13. Where there is an existing agreement, it might be most effective for the Parties to have the Meeting of the Parties of that instrument establish an institutional mechanism to define the compliance review procedure applicable to the treaty regime. In particular the Meeting of the Parties should consider to: 18/

(a) Establish a Compliance Review Committee for the review of compliance by the Parties with their obligations under the relevant convention; 19/

(b) Establish a Technical Committee responsible for facilitating the compliance review procedure (i.e. through setting scientific standards; elaborating options for the best available technology (BAT), and so forth);

(c) Determine the structure and functions of the Compliance Review Committee, the Technical Committee, and the procedures for review of compliance;

(d) Urge the Parties to the Convention, to decide that the structure, functions and procedures set out in this compliance review procedure should apply for the review of compliance under related or other relevant instruments;

(e) Resolve that the Compliance Review Committee as well as the structure, functions and procedures set out in the within instrument, should be available for the review of compliance with future related agreements, in accordance with the terms of those instruments and of any decisions of the Parties thereto.

Enhancing the compliance review procedure

14. In addition to the above basic requirements, to enhance compliance, the Meeting of the Parties should consider:

(a) Meeting regularly, at least once annually, or, alternatively, delegating relevant powers to the Compliance Review Committee;

(b) Preparing an indicative list of possible situations that may be subject to the compliance review procedure; 20/

(c) Elaborating positive incentive programmes to enhance and enable the possibility of compliance, such as transfer of technology, capacity-building, and financial incentives;

(d) Facilitating the meaningful and relevant participation of the public (including NGOs) in the compliance review process;

(e) Utilizing developments in telecommunications and information technology to make a significant contribution to effective compliance review;

(f) Encouraging the Parties to seek, and facilitate compliance with, creative responses to achieving the goals of the treaty regimes, such as financial arrangements across international borders and jurisdictions to effectively assist with the reduction of pollution; 21/

(g) Developing compliance review responses which are non-confrontational and non-judicial, i.e. consultations, fact-finding, commissions of inquiry, mediation, conciliation procedures and so forth;

(h) Encouraging the Parties to consider innovative national, sub-regional and basin-wide measures that facilitate compliance, such as voluntary agreements, joint compliance review stewardships, innovative transnational arrangements (i.e State-industry agreements) and so forth. 22/

From strategy to framework

15. With a view to implementing the compliance review strategy set forth above, following is a proposed framework for compliance review that might be adopted by Parties to an agreement on transboundary waters. This framework could be adapted to any treaty regime on transboundary waters.

III. OPERATIONALIZING THE COMPLIANCE STRATEGY - A PROPOSED FRAMEWORK FOR A COMPLIANCE REVIEW PROCEDURE

Motivation for establishing the compliance review procedure

16. Depending on the strategy adopted, the instrument of origin establishing the compliance review procedure may take a variety of forms (i.e. Protocol, decision of the Meeting of the Parties, and so forth. The latter mechanism may have distinct advantages over the former, such as being easier to negotiate, requiring less time to conclude and make effective). In any event, in setting forth the motivation for that document the Parties should:

(a) Refer to the goal of ensuring compliance with the relevant agreement on transboundary waters;

(b) Emphasise the importance of maintaining the integrity of the regimes thereby created;

(c) Emphasise the benefits of an established compliance review process in contributing to compliance with and maintaining the integrity of international regimes agreed to;

(d) Recognise the process of compliance as a collective obligation of the Parties and note the importance of consensus-building, confidence-building and enhancing a climate of trust in the enhancement of this process;

(e) Endorse the principle of public participation in the compliance review process;

(f) Refer to the relevant provisions of the relevant agreement on transboundary waters; 23/

(g) Refer to the relevance of the instrument establishing the committee to the compliance review of other agreements on transboundary waters.

Compliance review procedure: objectives

17. The objectives of the compliance review procedure should be to facilitate, encourage and ensure effective compliance with the agreement on transboundary waters in a manner that avoids complexity, confrontation, is transparent, 24/ and that leaves with the Meeting of the Parties the right to take decisions relating to the compliance verification and control.

Compliance information systems (reporting, review, evaluation)

18. The Parties should consider requiring reporting 25/ by the Parties to the Compliance Review Committee at regular intervals on the following range of issues:

(a) The legal, regulatory, or other measures taken by them to ensure compliance with the obligations under the treaty regime and of decisions and recommendations adopted thereunder, including in particular, measures taken to prevent and punish conduct in contravention of those provisions;

(b) The effectiveness of the measures referred to above;

(c) Problems encountered in complying with the relevant obligations.

Composition of the Compliance Review Committee

19. The Compliance Review Committee should:

(a) Consist of a limited number of Parties to the treaty regime. Only those Committee members Parties in good standing to the Convention in respect of which compliance procedures are undertaken may participate in those procedures. If as a result of the operation of this paragraph the size of the Committee is reduced to a number of members below that considered acceptable, the Committee should refer the matter in question to the Meeting of the Parties;

(b) Be elected in staggered terms in order to provide continuity and regular change of personnel;

(c) Elect its own Chairman and Vice-Chairman;

(d) Unless otherwise decided, meet regularly. The secretariat should arrange for and service the Committee s meetings.

Functions of the Compliance Review Committee

20. The Compliance Review Committee should:

(a) Review periodically compliance by the Parties with their reporting requirements;

(b) Consider any submission or referral made in accordance with this instrument with a view to securing a constructive solution;

(c) Be satisfied, before considering such a submission or referral, that the quality of data reported by a Party has been evaluated by a relevant technical body under the Meeting of the Parties or, where appropriate, by an expert nominated by the Meeting of the Parties; 26/

(d) Prepare, at the request of the Meeting of the Parties, and based on any relevant experience acquired in the performance of its functions regular reports on compliance with the specified obligations in the treaty regime. 27/

Parameters for compliance review

21. The Meeting of the Parties should consider establishing a list of situations subject for compliance review. 28/

Initiation of, access to, and transparency of the compliance review proceedings

22. A submission may be brought before the Compliance Review Committee by:

(a) One or more Parties to the Convention who may have reservations about another Party s compliance with its obligations under that instrument: Such a submission should be addressed in writing to the secretariat and supported by corroborating information. The secretariat should, within two weeks of receiving a submission, send a copy of it to the Party whose compliance is at issue. Any reply and information in support thereof should be submitted to the secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require. The secretariat should transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which should consider the matter as soon as practicable;

(b) A Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligation under the Convention: Such a submission should be addressed in writing to the secretariat and explain, in particular, the specific circumstances that the Party considers to be the cause of its non-compliance. The secretariat should transmit the submission to the Committee, which should consider it as soon as practicable. 29/

(c) The secretariat, when it becomes aware of possible non-compliance by a Party with its obligations: In such event, it may request the Party concerned to furnish necessary information about the matter. If there is no response or the matter is not resolved within three months or such longer period as the circumstances of the matter may require, the secretariat should bring the matter to the attention of the Committee.

Communications by the public

23. In involving the public in the compliance review procedure, 30/ Parties should focus on:

(a) Whether it is appropriate for the Compliance Review Committee to consider communications from the public;

(b) The extent to which the public should participate in the Compliance Review Committee;

(c) The extent to which the public should be involved in decision-making under the compliance review procedure;

(d) How the public is to be identified for the purposes of (a) to (c) above, taking into account that according to the UN/ECE Water Convention and its Protocol on Water and Health, the public means any one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations and groups. 31/

Information gathering

24. To assist the performance of its functions, the Committee may:

(a) Request further information on matters under its consideration, through the secretariat;

(b) Undertake, at the invitation of the Party concerned, information gathering in the territory of the Party;

(c) Consider any information forwarded by the secretariat concerning compliance with the Convention.

Entitlement to participate

25. A Party in respect of which a submission or referral is made should be entitled to participate in the consideration by the Committee of that submission or referral, but should not take part in the preparation and adoption of any report or recommendations of the Committee.

Confidentiality

26. The Committee should ensure the confidentiality of any information that has been provided to it in confidence.

Committee report to the Meeting of the Parties

27. The Committee should report at least once a year on its activities to the Meeting of the Parties and make such recommendations as it considers appropriate, taking into account the circumstances of the matter, regarding compliance with the Convention.

Measure for compliance review

28. The Parties to the agreement meeting within the Meeting of the Parties, may, upon consideration of a report and any recommendations of the Committee, decide upon measures of a non-discriminatory nature to bring about full compliance with the instrument in question, including measures to assist a Party s compliance. Any such decision should be taken by consensus.

Dispute settlement and compliance review procedure

29. Application of the compliance review procedure should be without prejudice to operation of the dispute settlement provisions contained in the relevant instruments. The Compliance Review Committee must be notified of any dispute settlement proceeding.

Annex II

LIST OF EXPERTS INVOLVED IN PROJECT PREPARATION AND DEVELOPMENT

Project leader

Mr. Willem KAKEBEEKE (Assistant Director General for International Environmental Cooperation, Ministry of Housing, Spatial Planning and Environment, The Hague, Netherlands)

Consultants

Ms. Nicolette BOUMAN (Centre for Research on River Basin Administration, Analysis and Management, Delft University of Technology, Delft, Netherlands, consultant on public participation in water management, see document MP.WAT/2000/6 and Add.1)

Mrs. Patricia WOUTERS (Director, Water Law and Policy Programme, University of Dundee, Dundee, Scotland, United Kingdom, consultant on compliance review procedures)

Invited experts

Mrs. Laurence BOISSON DE CHAZOURNES (Professor, Faculté de droit, Université de Genève, Geneva, Switzerland)

Mr. Konstantin R. GALABOV (Assistant Professor, Sofia, Bulgaria)

Mr. Nikolai GRISHINE (International Agency for Non-governmental Environmental Assessments Ecoterra, Moscow, Russian Federation)

Mrs. Aida ISKOYAN (President, Environmental Public Advocacy Centre, Yerevan, Armenia)

Mr. Jerzy JENDROSKA (former staff member of UN/ECE, now Professor of Law, Institute of Law, Wroclaw, Poland)

Mr. Tapani KOHONEN (former Executive Secretary, Baltic Marine Environment Protection Commission (HELCOM), Helsinki, Finland)

Mrs. Irina KRASNOVA (Academy of State Administration, Moscow, Russian Federation)

Mr. Alistair McGlone (Legal Adviser, Department of the Environment, Transport and the Regions, London, United Kingdom)

Mrs. Nina MUNTHE (Project Manager, Central and Eastern Europe Cooperation Programme, Swedish Environmental Protection Agency, Stockholm, Sweden)

Mrs. Gulnara ROLL (Managing Director, Center for Transboundary Cooperation (NGO), Tartu, Estonia)

Mr. Vadim SOKOLOV (Deputy Director, Scientific-Information Centre of the Interstate Commission for Water Coordination in the Aral Sea Basin, Tashkent, Uzbekistan)

Mr. Stephen STEC (Regional Environmental Centre for Central and Eastern Europe (REC), Szentendre, Hungary)

Mr. Carel de VILLENEUVE (Ministry of Transport, Public Works and Water Management, The Hague, Netherlands)

Observers

Mr. Bastien AFFELTRANGER (Consultant for UNESCO, Division of Hydrology, Paris, France)

Staff of UN/ECE and UNEP/ROE secretariats

Mr. Mark BERMAN (Legal Officer, Former staff member of UNEP/ROE, Geneva, Switzerland)

Mr. Rainer ENDERLEIN (Secretary of the Meeting of the Parties, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, UN/ECE, Geneva, Switzerland)

Ms. Sabine HOEFNAGEL (UNEP/ROE, Geneva, Switzerland)

Ms. Fairouz NICHANOVA (Regional expert for countries in transition, UN/ECE, Geneva, Switzerland)

Mr. Jeremy WATES (Secretary of the Meeting of Signatories, Convention on Access to Information, Public Participation in Decision-Making and

Access to Justice in Environmental Matters; former coordinator of NGOs
campaign on Public Participation, UN/ECE, Geneva, Switzerland)